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The Federal Power over Carriers and Corporations. By E. PARMLEE PRENTICE. (New York: The Macmillan Company. 1906. Pp. 244.)

This book is distinctively polemic in purpose and tone, and has the merits and limitations incident to that character. The author strongly disapproves the trend in public and judicial opinion toward a broad construction of the commerce clause of the Federal Constitution, and deems it unwarranted by the circumstances of its origin and history. It is, in his view, "a most dangerous and mistaken notion" that present questions in interstate commerce are new and beyond the contemplation of the statesmen of a century ago. He, therefore, strongly condemns the proposed requirement of a federal license or federal incorporation for corporations engaged in interstate commerce, and insists that it will result in "a complete centralization of the government."

The book shows extensive research, is copious in citations and quotations, not only of judicial decisions, but of speeches of members of congress, addresses, newspaper editorials, etc. As the number of pages indicates, the book is not to be criticised for any needless iteration of amplification, but rather for inadequacy of treatment of so grave and complicated a subject.

The book is not addressed distinctively to lawyers, who are, as a rule, more interested in knowing how the law has been declared than in what may be termed academic discussion as to how it ought to have been declared. While all thoughtful citizens ought to be interested in the discussion of the limits of the as yet unexercised power of the federal government of the commerce clause, any intelligent discussion must necessarily be based primarily upon the clear statement of what the courts have decided as to the construction of the commerce clause. This is the more necessary in view of the confused and uncertain trend of judicial decisions in the past, and the close divisions of the supreme court in adapting the concise and comprehensive language of the commerce clause of the Constitution to the new problems presented by the amazing commercial expansion of the country.

The inadequacy of this method of treatment of the subject is illustrated by the author's reference to the recent Lottery Case, wherein the reasoning if not the conclusion of the court is the most significant of all its decisions as to the limits of the unexercised federal power in the regulation of commerce. It was decided by

the court in this case, though with a close division and strong dissent, that congress could rightfully prohibit certain traffic among the States when it deemed that the public good required that form of regulation; in other words, that it was a question of legislative discretion when regulation may rightfully be effected by prohibition. The book under review contains several references to the dissenting opinion in this case, but has no statement or reference concerning the prevailing opinion or the decision of the court. It is true that the case related only to the *subjects* of commerce among the States, and did not directly involve the power of congress in controlling the corporate relations of parties engaged in such commerce, and it is also true that the prevailing opinion declined to formulate any general rule as to the power of congress; nevertheless, any discussion of the unexercised power of congress in the regulation of interstate commerce over corporations or carriers is incomplete without recognition of the full import of the Lottery Case, as set forth in the prevailing, as well as the dissenting opinion of the court.

Any discussion of the commerce clause must begin with the great case of *Gibbon v. Ogden*, and an interesting chapter of this book is, therefore, devoted to the historic setting of this decision. The author points out that the decision, rendered in 1824, related solely to navigation by water, and did not refer to transportation by land; and that the State law was involved not because it established a monopoly in interstate transportation, but because it amounted to a regulation of the coasting trade, a subject which had been wholly confided to congress. The author, therefore, expresses the opinion that later decisions have been influenced by the broad expressions in the opinion of Chief Justice Marshall, not involved in the case before the court. While it may be true that the case in judgment in *Gibbons v. Ogden* does not warrant certain contentions now made as to the unexercised power of congress in the regulation of commerce, it cannot be said that the conclusion is warranted that the reasoning and scope of the decision related solely to transportation by water. Navigation was treated in *Gibbons v. Ogden* as an element of commerce, which was a form of transportation since largely superseded by railroads. It was directly decided that the federal power under the commerce clause, wherever it was extended, was exclusive, and included in its comprehensiveness all known modes of transportation, whether propelled by water or steam and whether of passengers or freight. While the case before the court involved transpor-

tation by water, this was covered by the commerce clause not because it was transportation by water, but on the broader ground, that it was transportation among the States, and that was an element of commerce.

These considerations relate rather to the plan of the work than to its execution. It has distinctive merit in its clear and vigorous discussion of the limitations of the unexercised power of congress under the commerce clause. As there is little in the way of direct judicial authority on this subject, there is a legitimate field for such discussion. The author points out that the Constitution was framed during the short period when political ideas were those of the completest individual liberty; that the right to engage in commerce was derived from State law and vests in those to whom the State grants it, whether citizen, alien or corporation. He, therefore, heartily concurs with the view of the minority judges who dissented in the Northern Securities Case and the Lottery Case. He comments upon the fact that there is no express federal power of incorporation, and that the power has been sustained in the case of national banks as a means and not as an end. The constitutional difficulty lies not in the power of congress to incorporate companies for carrying on interstate and foreign commerce, but in its power to enforce such incorporation by limiting the right to engage in commerce among the States to those possessing a federal franchise or a federal license.

The author's discussion of the unwisdom and impolicy of centralization on broad considerations of public policy is more satisfactory than his presentation of the constitutional questions involved. He forcibly points out the impracticability of effecting great social reforms, such as the prohibition of child labor, through federal legislation in advance of the development of local public opinion, which is essential to make any such legislation effective.

The commerce clause was written for the days of the stage coach and the sailing vessel and it has been adapted by judicial construction to the age of steam and electricity. The increasing difficulty of construing a written constitution to meet the altered social and economic conditions never contemplated by its framers is illustrated by the close divisions of the supreme court in the Insular Cases, the Anti-Trust Railroad Cases, and the Lottery Cases, which contrast strikingly with the unanimity of the court in the great constitutional decisions of our earlier history. The developing power of public opinion, growing out of the changed economic conditions will doubt-

less affect in the future as it has in the past, the construction of the commerce clause.

The decision of the supreme court in the Wabash Railway Cases, in 1886, that the State power of regulation of railway traffic did not and could not extend to interstate traffic in any form, even as to that part of it within the State, and that such regulation could only be effected by congress, was immediately followed a few months later by the enactment of the interstate commerce act of 1887. The action of congress was really forced by the demonstration of the impossibility of State action.

The book of Mr. Prentice, notwithstanding the limitations incident to its polemic character, is an interesting and suggestive contribution by a thoughtful man to the discussion of a great question.

F. N. JUDSON.

Documentary History of Reconstruction: Political, Military, Social, Religious, Educational and Industrial, 1865 to the Present Time.
By WALTER L. FLEMING, Ph.D. (Cleveland: The Arthur H. Clark Company. Vol. I. 1906. Pp. xviii, 493; Vol. II. 1907. Pp. xiv, 480.)

These volumes of documents come at an opportune time, for much study has been and is being given to the period of reconstruction, and the field has by no means been exhausted. To those who do not care to rely altogether upon the interpretation given by the numerous writers to the events of that exciting period, and yet to whom the original sources are not accessible, these two volumes will be a welcome contribution. There is probably no one who has devoted so much time and study to an examination of the documents relating to that period as has Dr. Fleming, and he is thus well qualified to exercise discrimination in the selection of those documents which will be of most value to students in general. There were so many documents from which to choose that it was no easy task to select those which would be of most permanent value, and there will hardly be any one who will examine either of the volumes without wishing that some particular document or documents had been included instead of some which have found a place in them.

The more important documents like the civil rights bill of 1866, the freedmen's bureau acts, the thirteenth, fourteenth and fifteenth